No. 93-70

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

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BRIEF FOR THE STATE OF INDIANA AS AMICUS CURIAE SUPPORTING CERTIORARI

PAMELA CARTER
Attorney General of Indiana

LAWRENCE MARK REUBEN*
AREND J. ABEL
MATTHEW R. GUTWEIN
Deputy Attorneys General
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Counsel for the State of Indiana
**Counsel of Record*

QUESTION PRESENTED

Whether a state may impose fees designed to offset the additional costs incurred by it due to the importation of solid waste from other states, to avoid subsidizing the disposal of such waste, without violating the Commerce Clause.

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INTEREST OF THE AMICUS CURIAE

The State of Indiana has a strong interest in the constitutional rules that govern the interstate transportation and disposal of municipal waste. Because of its location and relatively low disposal costs, large quantities of municipal waste are shipped to Indiana for disposal. See *Government Suppliers Consolidating Services v. Bayh*, No. IP91-899C (S.D. Ind. Feb. 5, 1992), *reprinted at* No. 92-821, Pet. App. 35, *rev'd*, 975 F.2d 1267 (7th Cir.

1992), *cert. denied*, 113 S. Ct. 977 (1993) (*"GSCS II"*).[1] As a consequence, the State has been the recipient of untold thousands of tons of waste that were generated in other States. Indiana accordingly has attempted to develop a constitutionally acceptable means of ensuring that the costs associated with regulating the safe disposal of this waste are borne in a fair manner by those who create those costs.

The statute that Oregon enacted to address this problem, and that was upheld by the Oregon Supreme Court in this case, is virtually identical to an Indiana law that was recently struck down by the Seventh Circuit in *GSCS II*. While Indiana is in complete agreement with Oregon on the merits of the issue presented here, Indiana has an important interest in having this Court grant review so that it may validate the constitutionality of Indiana's approach. More broadly, Indiana has an interest in having this Court clarify the rules governing the interstate transportation and disposal of waste in a manner that is sensitive to the problems of recipient States. Indiana therefore submits this brief pursuant to Rule 37.5 of the Rules of this Court to assist the Court in the resolution of this case.

STATEMENT

This case concerns the constitutionality of an Oregon tax that is designed to generate funds to pay for the safe disposal of solid waste. Under the system currently in force in Oregon, the State imposes a fee of $.85 per ton on both out-of-state and Oregon-generated waste that is disposed of in Oregon. Or. Rev. Stat. §§ 459A.110(5), 459A.110(6), 459A.115 (1991). In addition, Oregon imposes a surcharge "on solid waste generated out-of-

[1] The order of the district court in *GSCS II* is not reported; for the Court's convenience, we have cited to the copy of that order reprinted in the appendix to the certiorari petition filed in *GSCS II*.

state"; the surcharge is explicitly limited to "person[s] who dispose[] of solid waste generated out-of-state." Or. Rev. Stat. § 459.297 (1991). This fee must be set by the Oregon Environmental Quality Commission at a level that will pay for "the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state." Or. Rev. Stat. § 459.298 (1991). Such costs include those associated with permit issuance, management, monitoring, and closure activities at disposal sites accepting out-of-state wastes. See Pet. App. 17a.

Following an administrative hearing, the Commission established $2.25 per ton as the additional fee for waste generated out-of-state. Or. Admin. R. 340-97-120(7). An equivalent fee is not imposed on wastes generated in-state.[2]

A Commerce Clause challenge to this distinction in treatment between in-state and out-of-state waste was rejected by the state courts. The court of appeals explained that "[t]he legislature has made abundantly clear that it intends only to make 'out-of-state generators pay their "fair share" of the costs' and no more." Pet. App. 43a-44a. The Oregon Supreme Court agreed. After rejecting (in relevant part) a state law attack on the Oregon regime (*see id.* at 7a-15a), the court found that "[b]ecause of the express nexus to actual costs incurred, * * * the surcharge [on out-of-state waste] does not, on its face, constitute discrimination against an article of commerce, the origin of which is outside the state. There is a discernible basis for the surcharge apart from that origin." *Id.* at 17a. The court added that, "rather than being a constitutionally impermissible burden on out-of-state economic interests * * * the surcharge imposed on

[2] As petitioners explain (at Pet. 7 n.4), the $.85 per ton fee on out-of-state waste will become ineffective if the $2.25 per ton fee on the waste is upheld by the courts. Thus, the additional fee is only $1.40 per ton.

out-of-state waste by ORS 459.298 and its implementing regulations constitutes a 'compensatory' fee for specific costs incurred by the state in the regulation of that waste" and therefore "is *prima facie* reasonable." *Id.* at 18a.

REASONS FOR GRANTING THE WRIT

This case presents a question that is of great importance to Indiana and other States that are recipients of large volumes of out-of-state waste. Indiana, like Oregon, enacted a regulatory framework that would have required the generators of out-of-state waste to pay their fair share of the costs of regulating the safe disposal of that waste -- that is, pay for the added costs that are attributable to such waste that in-state generators pay for in the form of general taxation. In contrast to the decision below, however, the Seventh Circuit held Indiana's law unconstitutional. Because those decisions cannot be reconciled, and because the problems associated with the disposal of waste are of enormous practical significance, review of the decision below is warranted.

A. The Decision Below Conflicts with a Recent Decision of the Seventh Circuit

In 1991, the Indiana legislature enacted a set of laws intended to address the problems associated with the disposal of out-of-state waste and that, in relevant part, were identical to the Oregon statute at issue here. Like the Oregon statute, Indiana law imposed a base per ton disposal fee (in Indiana's case, $.50) that was levied on both in-state and out-of-state waste. *See* Ind. Code § 13-9.5-5-1(a)(1), (2)(A) (1991), *reprinted in GSCS II*, 975 F.2d at 1271 n.4. Like the Oregon statute, Indiana law authorized an additional fee on wastes that were generated out-of-state. *See* Ind. Code § 13-9.5-5-1(a)(2)(B). Like the Oregon statute, Indiana law directed an administrative agency to carefully calibrate the additional fee at an amount "necessary to offset the costs incurred by the state

or a county, municipality, or township that can be attributed to the importation of the solid waste into Indiana and the presence of the solid waste in Indiana." Ind. Code § 13-9.5-5-1(b)(2).[3]

Also like the Oregon statute, the Indiana law was justified on the ground that it "'offset[] what would otherwise be a subsidy for interstate commerce' and 'require[d] out-of-state haulers [of waste] to shoulder their fair share of in-state administrative costs.'" *GSCS II*, 975 F.2d at 1283 (citation omitted). This is, of course, precisely the rationale upon which the Oregon courts upheld the tax at issue here. The Indiana law was upheld by the district court in the *GSCS II* litigation on just that ground; the court found that "the statute does not set an arbitrarily high fee on out-of-state trash. On its face, the provision premises any additional charge to out-of-state haulers on the amount necessary to offset governmental costs attributed to the importation of such waste, and this is sufficient to give it facial validity." *GSCS II*, No. 92-821, Pet. App. 65.

The Seventh Circuit nevertheless reversed. It struck down the Indiana law for the reason advanced by petitioners here in their challenge to the Oregon statute: the Seventh Circuit held the Indiana law per se unconstitutional because it "impose[d] a tax on haulers of waste who cross the state line, while sparing haulers of waste who remain entirely within the state." 975 F.2d at 1284 (footnote omitted). The court of appeals thus held that States may raise funds to ensure the safe disposal of waste only by imposing identical taxes on in-state and out-of-state wastes, despite the fact that generators of in-state

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[3] The Indiana law was invalidated before the agency had an opportunity to set the fee. *See GSCS II*, 975 F.2d at 1271.

waste already pay for those additional governmental costs through general taxation.

The decision of the Oregon Supreme Court in the present case and the holding of the Seventh Circuit in *GSCS II* plainly are irreconcilable. It cannot be disputed that Indiana's law would be valid if evaluated under the standard adopted by the Oregon Supreme Court in this case. Indiana and the other States in the Seventh Circuit thus are governed by a different constitutional rule than the one now applicable in Oregon. This Court should grant review to resolve the conflict.

B. The Issue Here Is an Important and Recurring One

That there is a conflict between a state court of last resort and a federal court of appeals on a significant issue of constitutional law is enough to justify consideration of the case by this Court. It also bears emphasis, however, that questions relating to the interstate disposal of waste are of great practical importance and have generated continuing confusion in the lower courts.

The disposal of solid waste is an enormous national enterprise, and the rules governing its disposal are of corresponding significance. Each year, our nation generates some 180 million tons of municipal solid waste. *See Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency) (*"House Hearings"*). Approximately 15 million of these tons move in interstate commerce. *See id.* at 81. Indeed, only one of

the 50 states is neither an importer nor an exporter of waste. *See id.* at 283-291 (statement of Allen Moore).[4]

Some of the reasons for this movement are manifest. Space limitations, high land prices, or unfavorable geological conditions make disposal of waste in some areas much more expensive than in others. Indiana's experience is illustrative. The cost of waste disposal in an Indiana landfill is approximately $15 per ton; by way of contrast, disposal of waste in some East Coast landfills may cost $125 per ton. Even taking into account transportation costs (approximately $35 per ton), it costs more than twice as much to dispose of East Coast waste at the point of generation than in Indiana. *See GSCS II*, No. 92-821, Pet. App. 43 (district court opinion). As a result, Indiana has received untold tons of other people's waste.

As might be imagined, this has imposed a significant burden on Indiana. There is reason to believe that out-of-state waste contains hazardous and other dangerous materials. *See Government Suppliers Consolidating Services v. Bayh*, 753 F. Supp. 739, 754-756 (S.D. Ind. 1990) (*"GSCS I"*). In addition, many waste disposal sites pose health risks and must be carefully monitored. *See id.* at 748. As matters now stand, the cost of regulation to guard against these dangers falls upon the people of Indiana, and out-of-state generators have a "free ride" because they are not required to pay for those costs attributable to their activities.

Attempts by the States and local governments to deal with these problems have led to continuing litigation, including two recent decisions of this Court and myriad

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[4] Of the 48 contiguous States, 38 both import and export waste. Five states and the District of Columbia are exporters only; four States are importers only. *See House Hearings* 283-291 (statement of Allen Moore).

decisions of federal and state courts across the nation. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). *See also, e.g., National Solid Wastes Management Ass'n v. Voinovich*, 959 F.2d 590 (6th Cir. 1992); *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991); *Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482 (9th Cir. 1987); *Browning-Ferris, Inc. v. Anne Arundel County*, 438 A.2d 269, 271-272 (Md. 1981); *Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 495 A.2d 49 (N.J.), *cert. denied*, 474 U.S. 1008 (1985); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 417 N.E.2d 78 (N.Y. 1980). This problem will only grow worse as the volume of waste increases (annual production of municipal solid waste is projected to reach 216 million tons by the year 2000) and the capacity of existing landfills is exhausted (landfill disposals increased from 99.7 million tons in 1975 to 130.5 million tons in 1988). *See* United States Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update* 10, ES-3. *See also* 56 Fed. Reg. 50,980 (1991) (45% of solid waste landfills expected to reach capacity by 1991).

Indiana, like Oregon, believes that it had taken a reasonable and wholly constitutional approach that accommodated the competing interests by "levelling the playing field" to prevent an unfair subsidy to waste from other states. In contrast, the approach adopted by the Seventh Circuit and advocated by petitioners -- imposing an arbitrary uniform fee on out-of-state and in-state waste -- does not level the playing field; instead, it places a special burden on the citizens of recipient States. As Chief Justice Rehnquist has observed, a recipient State's

> general tax revenues presumably already support the State's various inspection and regulatory efforts designed to ensure [waste facilities'] safe operation. Thus, [recipient State residents] will be made to pay twice, once through general taxation and a second time through a specific disposal fee. Permitting differential taxation would, in part, do no more than recognize that, having been made to bear all the risks from such hazardous waste sites, [the recipient State] should not in addition be made to pay *more* than others in supporting activities that will help minimize the risk.

Chemical Waste Management, 112 S. Ct. at 2018-2019 (Rehnquist, C.J., dissenting) (emphasis in original). Whether the approach taken by Indiana and Oregon is permissible was left open in *Chemical Waste Management*. Alabama did not argue in this Court "that the additional fee makes out-of-state generators pay their 'fair share' of the costs of Alabama waste disposal facilities." 112 S. Ct. at 2016 n.9. Instead, as the Seventh Circuit noted, "the constitutionality of [the Alabama] fee hinged on the state's admitted purpose (to slow the volume of waste coming into its Emelle facility); * * * the Court did not consider the argument made here by Indiana" and Oregon. *GSCS II*, 975 F.2d at 1283 n.12.

Indiana firmly believes that compensatory fees may be imposed on the disposal of out-of-state waste. Therefore, this Court should grant the writ and uphold Oregon's law so that Indiana and the other States in the Seventh Circuit may use that approach.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

LAWRENCE MARK REUBEN*
AREND J. ABEL
MATTHEW R. GUTWEIN
Deputy Attorneys General
219 State House
Indianapolis, Indiana 46204
(317) 232-6201
Counsel for the State of Indiana
**Counsel of Record*

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